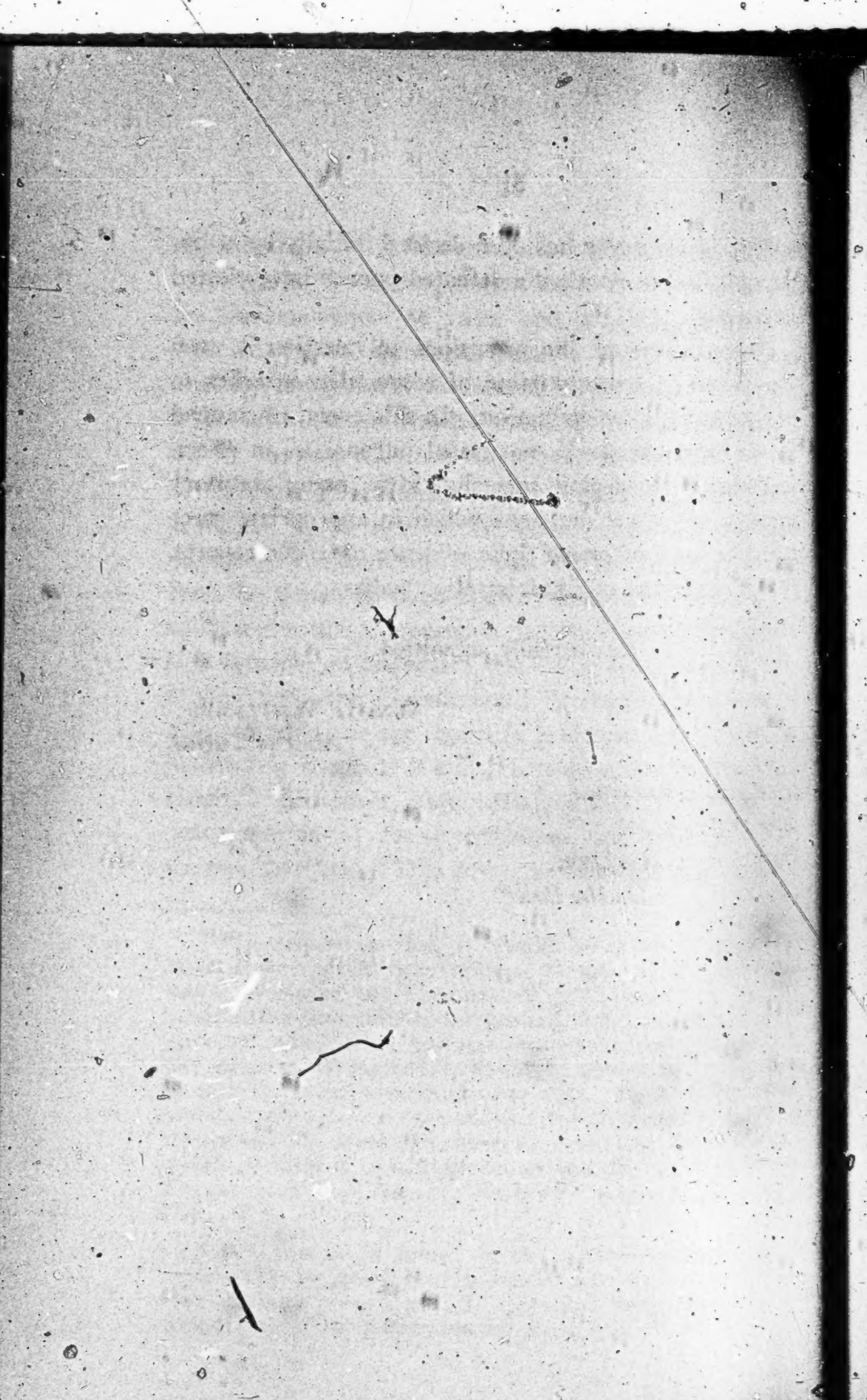

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 28

DAN B. SHIELDS and INTERSTATE COMMERCE COMMISSION,

Petitioners,

vs.

THE UTAH IDAHO CENTRAL RAILROAD COMPANY,

Respondent.

MOTION OF WM. D. WHITNEY FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AS *AMICUS CURIAE*, AND SUPPLEMENTAL BRIEF *AMICUS CURIAE*

WM. D. WHITNEY,
Amicus Curiae.

DONALD C. SWATLAND,
JOHN E. BUCK,
FRANCIS A. E. SPITZER,
On the brief.

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No. 28

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF *AMICUS CURIAE*

Now comes WM. D. WHITNEY, *amicus curiae*, and respectfully moves that this Honorable Court accept and consider the supplemental brief in the form annexed hereto and made a part hereof. This motion is made because, upon the argument of this case, several members of this Honorable Court expressly inquired as to a question having a vital bearing upon the procedural problems involved, viz., as to the intention of the Congress in referring the question to the Interstate Commerce Commission and as to the consequent weight to be accorded to a determination by that Commission. No other question is considered in the attached supplemental brief.

Respectfully submitted,

WM. D. WHITNEY,
Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

DAN B. SHIELDS and INTERSTATE COMMERCE COMMISSION,
Petitioners,

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THE UTAH IDAHO CENTRAL RAILROAD COMPANY,
Respondent.

No. 28

SUPPLEMENTAL BRIEF *AMICUS CURIAE*

This supplemental brief is addressed to the single question as to the intention of the Congress in entrusting the determination to the Interstate Commerce Commission.

In listening to the questions of the Court on the oral argument, we understood the question to be raised as to whether the Congress intended to go so far as to provide that the general rule would be that all carriers were to be subject to the statute, that exceptions in favor of particular interurbans were to be accorded only when the Commission in its wisdom and experience should determine to accord them, and that denials by the Commission should leave to the carrier, upon a proceeding in court, only an opportunity to prove that the effect of the Commission deci-

sion had been (as it were) to turn black into white or white into black.[1]

We submit that the Court, on reflection, will in any event find no support in the statute for the view, more extreme even than any taken in the Solicitor General's brief, that the statute in effect entrusted to the Commission the *legislative* function of re-defining the meaning of a statutory phrase which had been found intact in numerous prior statutes,[2] which had been construed thereunder by this Court as well as by the Commission, and the proposed amendment of which had been the subject of numerous Commission recommendations in its annual reports to Congress.

We do not say that the Congress could not constitutionally have taken a different course and entrusted a legislative function to the Commission. For example, it might have provided that all carriers should be subject to the Act excepting only those which, in the opinion of the Commission, were so divorced from the general system of steam transportation that their operations do not affect the functioning thereof. In other words, we agree that, Congress

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[1] To answer this question in the negative, is not to deprive the Commission determination of the same full force and effect that would have been accorded to it if the statute had gone on expressly to provide that its determination of fact should be conclusive if supported by evidence. This supplemental brief does not discuss the point, suggested in our main brief, that the carrier is entitled to a trial *de novo* in which the only weight to be accorded to the Commission determination is that which the courts themselves elect out of comity to accord to it.

[2] The present statutory phrase ("*Provided, however,* That the term 'carrier' shall not include any street, interurban or suburban", etc.) is at least as strong as the phrase, in § 20a of the Interstate Commerce Act, construed by this Court in the *United States* v. *Chicago, North Shore & Milwaukee,* 288 U. S. 1 ("except a street, suburban or interurban" etc.).

could have made a delegation of power to the Commission, provided, of course, that adequate standards had been set up.

But that is not what Congress did here. Here, it simply re-enacted identically the same statutory clause that had already acquired a particular legal significance, and it entrusted to the Commission only the *judicial* function of applying the Congress's own definition to particular cases and controversies as they might arise. That this was the Congressional intention, is brought into clear relief by the provision that the Commission should only act when particular cases were submitted to it by the National Mediation Board (or other administrative body) or by other particular parties interested.

Nor is this a situation in which the terms of the statute are such that they have no content until the Commission has interpreted them. It cannot be said here, as "where the suit is based on unreasonable charges or unreasonable practices," that "there is no law fixing what is unreasonable and therefore prohibited".[2] Could that be said, then this Court could not have construed identical provisos in *I. C. C.* v. *Piedmont & Northern Railway Company*, 286 U. S. 299, and *U. S.* v. *Chicago North Shore & Milwaukee Railroad Company*, 288 U. S. 1.

The statutory scheme and intent of § 1 (First) of the Railway Labor Act is the more significant when considered in the light of the legislative circumstances pertaining to this and substantially identical exemption provisos in other statutes. The Interstate Commerce Commission has repeatedly recommended to Congress that such provisos in

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[2] *Mitchell Coal and Coke Company* v. *Pennsylvania Company*, 280 U. S. 247, 257.

the Interstate Commerce Act be amended (a) so as to make exemption depend upon affirmative grant thereof by the Commission in each individual instance and (b) so as to allow the Commission, in granting exemptions, broad discretion, by making the statutory test whether or not the carrier could show to the Commission's satisfaction that it was "not affected with an important national interest so far as the provisions in question are concerned."[4] Nevertheless, Congress did not amend the Interstate Commerce Act in that manner, thus indicating that it wished inclusion and exclusion to depend upon the terms of the statute and not upon the discretion of the Commission. And, as we have already noted, the language of § 1 (First) of the Railway Labor Act does not evidence any different intention in so far as concerns this Act.

To construe this statute as if it were a delegation of legislative power, when clearly it is not, would (we respectfully submit) create a precedent capable of engulfing our whole system of government under law. To hold that a statute of this character entrusts the Commission with the power of including a carrier within a statute because the Commission considers that it ought to be included, notwithstanding that the statutory clause had previously been construed by this Court as excluding carriers of that character[5], would, in effect, revive the dispensing power. We know that, however far this Court may feel constrained to go in recognizing the necessity of according to modern

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[4]42nd Annual Report of the Interstate Commerce Commission, dated December 1, 1928, page 83 (R. 252).

[5]As in our original brief, we do not re-argue the merits. As we consider procedural points only, our whole presentation is, of course, on the assumption *arguendo* that the decision on the merits is to be affirmed.

administrative bodies the fullest opportunity for effective action consistent with the principles of due process, it will never consciously extend that opportunity so as to revive the power of executive dispensation from legislative statutes. The vital need is that, whatever be the opinion of this Court in the present case, it shall not be open to that construction.

The suggestion by the learned Solicitor General on the argument was that the use of the words "provided however" in this statute establish that the Congressional policy was to subject all carriers to this statute, unless the Commission, in its wisdom and experience, should specifically exclude them. Equally well might it be said on the other side that the word "unless" meant that all electric interurbans were to be excluded from the statute, unless the Commission, in its wisdom and experience, should specifically include them. On reflection, each suggestion fails. As in all of the prior statutes using the same phraseology, the evident intention of the Congress was that carriers of one class were to be included, and carriers of another class excluded, and there was left only the problem of determining in each particular case into which class the particular carrier falls.

It was further suggested on the argument that the statutory phrase is not easy of precise definition. But this is nothing new. If all statutory phrases were susceptible to easy definition, the functions of the Federal Courts could soon be happily atrophied. Obviously, difficulty of definition is no basis for a rule that the duty of definition is to be transferred to administrative officers.

In presenting the foregoing considerations, we have necessarily omitted all of the secondary procedural ques-

tions bearing upon the problem as to the nature of the judicial review to be had in respect of this statute, delegating as it does to the Commission a function exercisable only in particular instances and in lieu only of the function that would normally be exercised only by the executive officers administering the statute (here the National Mediation Board), and devoid as it is of any express provision for judicial review. All of these considerations were covered in our original brief.

Respectfully submitted,

WM. D. WHITNEY,
Amicus Curiae.

DONALD C. SWATLAND,
JOHN E. BUCK,
FRANCIS A. E. SPITZER,
On the Brief.

ME COURT OF THE UNITED STATES.

No. 28.—October Term, 1938.

Shields, individually and as
d States Attorney for the Dis-
of Utah, and Interstate Com-
e Commission, Petitioners,
vs.
Utah Idaho Central Railroad
Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[December 5, 1938.]

Chief Justice Hughes delivered the opinion of the Court.

case presents the questions of the effect of a determination Interstate Commerce Commission, for the purposes of the y Labor Act, that the respondent is not an interurban elec- ilway, and of the scope of judicial review of that determina-

Railway Labor Act, which applies to railroads engaged in tate commerce, excepts any "interurban" electric railway un- is operating as a part of a general steam-railroad system of portation.[1] The Interstate Commerce Commission is "author- and directed upon request of the Mediation Board or upon laint of any party interested to determine after hearing her any line operated by electric power" falls within the ex- ion. At the request of the Mediation Board, the Interstate merce Commission after hearing determined that the lines of ondent, the Utah Idaho Central Railroad Company, do not con- te an interurban electric railway. 214 I. C. C. 707. The Medi- n Board ordered respondent to post the formal notice prescribed Section 2, Eighth, of the Railway Labor Act.[2] Respondent did comply. Failure to publish the notice subjects "the carrier, cer or agent offending" to criminal penalties.[3] Respondent, in- ing that its line is an interurban electric railway and thus ex-

[1] 48 Stat. 1185; 45 U. S. C. 151.
[2] 45 U. S. C. 152, Eighth.
[3] 45 U. S. C. 152, Tenth.

cepted from the Railway Labor Act, and alleging the invalidity of the Act, brought this suit against the United States Attorney for the District of Utah to restrain him for prosecuting any proceeding based upon an alleged violation of the Act.

The District Court took jurisdiction, permitted respondent to try the question *de novo*, decided that respondent was an interurban electric railway, and granted a permanent injunction. The Circuit Court of Appeals affirmed. 95 F. (2d) 911. We granted certiorari. May 31, 1938.

As respondent, however characterized, is engaged in interstate transportation, the question whether it should be subjected to the requirements of the Railway Labor Act, relating to the adjustment of labor disputes, was one for the decision of Congress. These requirements were prescribed in the exercise by Congress of its constitutional control over interstate commerce. *Texas & New Orleans R. R. Co.* v. *Railway Clerks*, 281 U. S. 548; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515. As Congress was free to establish the categories which should be excepted, Congress could bring to its aid an administrative agency to determine the question of fact whether a particular railroad fell within the exception, and Congress could make that factual determination, after hearing and upon evidence, conclusive. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 51. For that purpose Congress could create a new administrative agency or use one already existing. And as the questions of fact involved would relate to methods of railroad transportation, and thus to a field in which the Interstate Commerce Commission had peculiar expertness, Congress could fittingly commit the determination to that body.

Congress did not define the term "interurban". Despite the desirability of such a definition[4] and the difficulties occasioned by its absence, the term is not so destitute of meaning that it can be denied effect as a valid description. Respondent, standing upon the exception, necessarily treats it as valid and hence as susceptible of application. That view presupposes that the term "interurban" denotes distinguishing factual characteristics which on appropriate inquiry may be ascertained. We have so treated the term in other relations. *Piedmont & Northern Rwy. Co.* v. *Interstate Commerce*

[4] Annual Reports of Interstate Commerce Commission, 1921, p. 21; 1923, p. 70; 1924, p. 72; 1925, p. 72; 1928, p. 83; 1929, p. 80; to which reference is made in United States v. Chicago North Shore & Milwaukee R. R. Co., 288 U. S. 1, 11, 12.

Commission, 286 U. S. 299; *United States* v. *Chicago North Shore & Milwaukee R. R. Co.*, 288 U. S. 1. The conferring of authority upon the Interstate Commerce Commission to determine whether a particular electric railway is an interurban one cannot be regarded as an unconstitutional delegation of power. See *United States* v. *Chicago North Shore & Milwaukee R. R. Co.*, *supra*, at pp. 13, 14.

In the instant case, the Interstate Commerce Commission has made the determination contemplated by the statute and we are not concerned with the questions which might arise in its absence. The Commission's determination was one of fact. *Shannahan* v. *United States*, 303 U. S. 596, 599. What effect shall be ascribed to it? The argument is pressed that the determination is at best persuasive and not in any wise binding upon the courts. It is urged that the Commission was restricted to determining whether respondent was operated as a part of a general steam-railroad system of transportation, which concededly it was not; that the determination of the Commission was not an "order"; that Congress has not manifested an intention that the determination should be binding in judicial proceedings and that in the nature of things it could not be made binding in criminal prosecutions.

We are unable to agree with the view expressed in the court below that the Commission was confined to determining whether respondent was operated as a part of a general steam-railroad system of transportation. Before reaching that point—as to which there was no question—the Commission had to determine whether respondent was an "interurban" line. That has been the administrative construction of the statutory provision[5] and we see no reason to doubt its correctness.

In considering the effect of the Commission's determination, the fundamental question is the intent of Congress. The language of the provision points to definitive action. The Commission is to "*determine*". The Commission must determine "*after hearing*". The requirement of a "hearing" has obvious reference "to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts". The "hearing" is "the hearing of evidence and argument". *Morgan* v. *United States*, 298 U. S. 468, 480. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties

[5] See Texas Electric Railway, 208 I. C. C. 193; Chicago South Shore & South Bend Railroad, 214 I. C. C. 167; Utah Idaho Central Railroad Company, 214 I. C. C. 707.

affected by the determination of an administrative body are entitled to insist. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.* 227 U. S. 88, 91. The Commission is not only authorized but "directed" to give the hearing and make the determination when requested. We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect. On the contrary, in view of the nature and purpose of the proceeding, we must regard the determination as binding on both the carrier and the Mediation Board. The latter having obtained the determination could not ignore it; neither could the carrier.

We have held that the determination of the Commission is not an *"order"* reviewable under the Urgent Deficiencies Act of October 22, 1913.[6] *Shannahan* v. *United States, supra.* But we have not held that the determination of the Commission was not subject to judicial review by other procedure, a question which, as we said in the *Shannahan* case, we had no occasion there to consider. *Id.*, at p. 603. The nature of the determination points to the propriety of judicial review. For, while the determination is made by the Interstate Commerce Commission for the purposes of the Railway Labor Act and not for further proceedings by the Commission itself, it is none the less a part of a regulatory schema. It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act which was enacted to regulate the activities of transportation companies engaged in interstate commerce.[7] The Mediation Board has ordered the posting of the prescribed notice that disputes between the carrier and its employees will be handled under the Railway Labor Act. Disobedience is immediately punishable and it is made the duty of the United States Attorney to institute proceedings against violators. Respondent has invoked the equity jurisdiction to restrain such prosecution and the Government does not challenge the propriety of that procedure. Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions. *Philadelphia Company* v. *Stimson*, 223 U. S. 605, 621, 622; *Truax* v. *Raich*, 239 U. S. 33, 37, 38; *Terrace* v. *Thompson*, 263 U. S. 197, 214. To support its contention that equitable relief is appropriate, respondent points to the peculiar difficulties which confront it under the congressional legislation. Congress has enacted two sets of statutes

[6] 38 Stat. 208, 219, 220, 28 U. S. C. 41, 46, 47.

[7] Compare Great Northern Railway Company v. United States, 277 U. S. 172, 180; Butte, Anaconda & Pacific Rwy. Co. v. United States, 290 U. S. 127.

which involve the application of the same criterion. If respondent is subject to the Railway Labor Act, it is excluded from the application of the National Labor Relations Act;[8] otherwise not. The Railroad Retirement Act of 1937[9] has a like proviso excepting interurban electric railways and authorizing the Interstate Commerce Commission to determine whether a particular electric railway falls within the exception. A similar provision is found in the Carriers Taxing Act of 1937[10] and in the Railroad Unemployment Insurance Act of 1938.[11] In these circumstances we think respondent was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status.

What is the scope of the judicial review to which respondent is entitled? As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees,[12] and could include or except interurban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions[13] with respect to a trial *de novo* so far as the character of the respondent is concerned. With respect to that question, unlike the case presented in *United States* v. *Idaho*, 298 U. S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (*Id.*, p. 107), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission,[14] the question on judicial review would be simply whether the Commission had acted

[8] 49 Stat. 449, Sec. 2(2).

[9] 50 Stat. 307.

[10] 50 Stat. 435.

[11] Public No. 72, 75th Cong., 3d sess. See, also, the provision of Section 9(a) of the Carriers Taxing Act of 1937, 50 Stat. 439, with respect to the application of the term "employment" as defined in Title VIII of the Social Security Act, Section 811(b).

[12] Texas & New Orleans R. R. Co. v. Railway Clerks, 281 U. S. 548; Virginian Railway Co. v. System Federation No. 40, 300 U. S. 515.

[13] Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289; Prendergast v. New York Telephone Co., 262 U. S. 43, 50; Bluefield Water Works Co. v. Public Service Commission, 262 U. S. 679, 689; Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 443, 444; Phillips v. Commissioner, 283 U. S. 589, 600; Crowell v. Benson, 285 U. S. 22, 60; State Corporation Commission v. Wichita Gas Co., 290 U. S. 561, 569.

[14] See United States v. Chicago North Shore & Milwaukee R. R. Co., 288 U. S. 1, 13, 14.

within its authority. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91; *Virginian Railway Co.* v. *United States*, 272 U. S. 658, 663; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 444; *Florida* v. *United States*, 292 U. S. 1, 12; *St. Joseph Stock Yards Co.* v. *United States*, *supra*.

The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. *Id.* That question must be determined upon the evidence produced before the Commission.

Taking that position, petitioners unsuccessfully objected in the District Court to the admission of new evidence. But that evidence was substantially the same as that produced before the Commission, which was also received. The facts carefully analyzed by the Commission (214 I. C. C. pp. 709-711) are virtually undisputed. Respondent's railway extends from Ogden, Utah, north to Preston, Idaho, a distance of 94.63 miles and has two branch lines of about 7 and 14 miles respectively. About 81.8 per cent. of the line is located on privately owned right-of-way and the remaining 18.2 per cent. on public streets or highways, these being chiefly in fifteen cities and towns. The Government concedes the point stressed by respondent that its line has many of the physical characteristics of an interurban railroad. Thus its tracks on the whole are of lighter weight, its grades slightly steeper, its curves sharper, its stations and sidetracks more frequent, its motive power of less capacity, its sidetracks shorter than is customary on trunk lines, and its passenger business is conducted in the same manner as that of any interurban electric railway. The passenger business, however, yields but a minor part (about 18.1 per cent.) of the total revenues. During the five years from 1930 to 1934, inclusive, the freight revenues amounted to $2,021,724.57 and the revenues from passengers, mail and express were $448,941.62. The railway is predominantly a carrier of freight. The freight traffic consists to a large extent of raw products such as sugar beets, milk, tomatoes

and peas moving to factories, canneries or processing plants, and of the manufactured products moving outbound from the plants to connecting railroads. A considerable part of the movement of the raw products requires special service with one-car or two-car trains. A daily package-merchandise train is maintained with facilities for refrigeration in summer and heating in winter and with pick-up and delivery service at all available points. In 1934 the freight trains averaged 6.2 cars each. In the last half of that year the carrier handled 6,354 carloads of freight of which 2,226 were local and 4,017 were interchanged with other carriers. The traffic originating on its line moved to points in 31 States and that delivered by it was from points in 26 States. Respondent is a party to practically all the tariffs publishing through rates to or from this territory and its interchange traffic generally moves on joint rates. It does not perform intermediate service between other lines. Practically all the interchange traffic is handled in standard equipment furnished by connecting railroads.

It cannot be said upon this evidence, and the related facts summarized in the Commission's report, that the Commission's determination lacked support or was arbitrary or capricious. Nor is there ground for holding that the Commission in reaching its determination departed from applicable principles of law. There is no principle of law which required such a carrier to be classified as an interurban railway. Failing in its effort to obtain a clarifying definition from Congress, the Commission performed its duty in weighing the evidence and reaching its conclusion in the light of the dominant characteristics of respondent's operations which were fairly comparable to those of standard steam railroads. Compare *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, *supra*, pp. 308-310; *United States* v. *Chicago North Shore & Milwaukee R. R. Co.*, *supra*, p. 10.

We conclude that the District Court erred in permitting a trial de novo of that issue and that the determination of the Commission was within its authority validly exercised. The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with direction to dismiss the bill of complaint.

It is so ordered.

Mr. Justice BLACK concurs in the result.